IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-412

BEN HILL LIVINGSTON
and
BETTY RUTH BURGESS,

Petitioners.

v.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT STATE OF GEORGIA

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THE STATE OF GEORGIA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT STATE OF GEORGIA

The Petitioners, BEN HILL LIVINGSTON and BETTY RUTH BURGESS, respectfully pray that a Writ of Certiorari issue to review the judgement of the Supreme Court of the State of Georgia entered in this proceeding on June 9, 1978.

JUDGMENT BELOW

The unpublished opinion of the Court of Appeals of the State of Georgia and the denial, by the Supreme Court of the State of Georgia, of a Writ of Certiorari appear in Appendix "A" attached hereto.

JURISDICTION

This Court's jurisdiction to review the judgment of the Supreme Court of the State of Georgia denying petitioners' Writ of Certiorari on June 9, 1978, is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED FOR REVIEW

Whether the law set forth by this Court in *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927), and applied in *Connally v. Georgia*, 429 U.S. 245, 97 S. Ct. 546 (19A) is applicable to cases which were pending at the time *Connally v. Georgia, Id.*, was decided.

STATUTE INVOLVED

U.S.C. Constitutional Amendment 14 § 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 5, 1976, Detective Paul Moore of the Cobb County, Georgia, Police Department secured a search warrant from Judge Cecil A. Daniel, a duly elected Justice of the Peace of the Coxes District. The warrant was issued for the premises located at 5830 Powell Drive, Mableton, Georgia, and occupied by Ben Livingston. As a result of this search, certain property was seized and formed the basis for prosecution in a subsequent indictment. *State of Georgia v. Livingston et al.*, No. 77-0163 (Superior Court Cobb County, April 25, 1977) (Order granting Motion to Suppress Evidence).

On January 10, 1977, this Court handed down its decision in *Connally v. Georgia*, 429 U.S. 245, 97 S. Ct. 546 (1977), which held that search warrants issued by justices of the peace were a violation of the due process clause of the 14th Amendment as it was interpreted in *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927).

On February 17, 1977, a grand jury indicted the petitioners. (R-13). On March 3, 1977, prior to arraignment and as provided by Georgia Law (R-21), petitioners filed a motion to suppress the evidence seized pursuant to the Justice of the Peace warrant. It was in support of this motion to suppress the evidence that petitioners raised their challenge to warrant in question.

On April 25, 1977, the Superior Court for the County of Cobb, State of Georgia, entered an Order granting petitioners' motion and suppressing the evidence seized. *State of Georgia v. Livingston et al.*, No. 77-0163 (Superior Court Cobb County, April 25, 1977) (Order granting motion to suppress evidence).

The State sought a review of this order by appeal to the Supreme Court of the State of Georgia, which found jurisdiction belonged to the Court of Appeals of the State of Georgia and transferred the case. *The State v. Livingston et al.*, No. 54176 (Supreme Court, January 5, 1978). (See Appendix "A").

The Court of Appeals reversed the order of the trial court, *The State v. Livingston et al.*, No. 55545 (Ct. App. Apr. 6, 1978), (See Appendix "A") and subsequently denied petitioners' motion for a rehearing *The State v. Livingston et al.*, No. 55545 (Ct. App., April 28, 1978). (See Appendix "A"). The Supreme Court of the State of Georgia denied petitioners a writ of certiorari to that court. *Livingston et al v. The State*, No. 33837 (Sup. Ct. June 9, 1978). (See Appendix "A").

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS' RIGHTS TO DUE PROCESS OF LAW, AS ORIGINALLY SET FORTH IN *TUMEY V. OHIO*, 273 U.S. 510, 47 S. Ct. 437 (1927), HAVE BEEN VIOLATED.

The Supreme Court of Georgia, by refusing to hear petitioner's case, has effectively deprived petitioners of their rights to due process of law. Over 50 years ago this Court held that " . . . it certainly violates the Fourteenth Amendment and deprives a defendant of due process of law to subject his liberty or property to the judgement of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey v. State of Ohio*, 273 U.S. *at* 523, 47 S. Ct. *at* 441 (1927). Here the rule was first set forth: a judicial official may not have a pecuniary interest in his decisions. *Id.*

When this Court handed down its decision on the unconstitutionality of search warrants issued by justices of the peace in *Connally v. Georgia*, 425 U.S. 245, 97 S. Ct. 547 (1977), it stated that "The present case, of course, is not precisely the same as *Tumey* or as *Ward*, but the principle of those cases, we

conclude, is applicable to the Georgia system for the issuance of search warrants by the justices of the peace." [emphasis added]. Thus, the decision on the part of the Supreme Court of Georgia to allow evidence against the petitioners to be admitted, even though such evidence was seized pursuant to authorization by a judicial official who was not neutral and impartial from a pecuniary viewpoint, deprives petitioners of a well established right to fair and impartial judicial decisions as set forth in *Tumey v. Ohio, supra*.

II.

THE SUPREME COURT OF GEORGIA HAS MISTAKENLY APPLIED THE "RETROACTIVE/PROSPECTIVE" DISTINCTION TO PETITIONERS' CASE.

The Supreme Court of Georgia denied petitioners a Writ of Certiorari to review the judgement of the Court of Appeals. *Livingston et al. v. The State*, No. 33837 (Sup. Ct. June 1978). It thus approved the opinion of the Court of Appeals that the order of the trial court was a retroactive application of a new constitutional rule. *The State v. Livingston et al.*, 55545 (Ct. App. April 6, 1978). This opinion is contrary to the law as set forth by this Court.

Connally v. Georgia did not set forth any new Constitutional rule; it merely applied a principle of law that was originally set forth in *Tumey v. Ohio*. *Connally v. Georgia*, 425 U.S. 245, 97 S. Ct. 546, 548 (1977). The application, in 1977, of a rule set forth in 1927, is not retroactive.

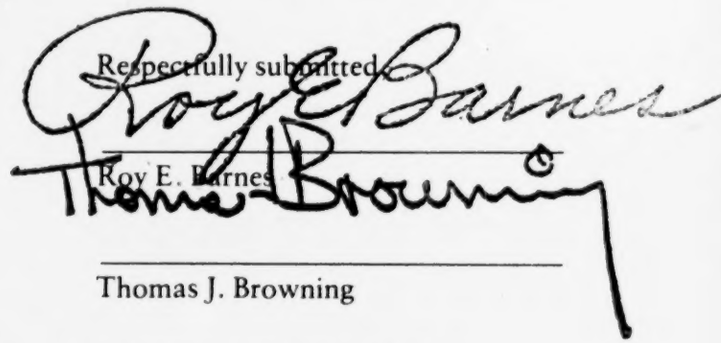
Moreover, even if the opinion of this court in *Connally v. Georgia, Supra*, did set forth a new constitutional rule, its application to the case sub judice would not be retroactive. This court first established the guidelines for the application of new constitutional rules in *Linkletter v. Walker*, 381 U.S. 618, 85 S.

Ct. 1731 (1969). These criteria for judging the merits of retroactive application of new rules were apparently irrelevant to cases which had not been finally decided as the court stated that "under our cases it appears . . . that a change in law will be given effect while a case is on direct review . . ." *Id.*, 627, _____. Surely the law would dictate that if the defendant in a case on direct appeal may benefit from a new constitutional ruling, then petitioners sub judice may also claim such benefit, as they had not yet even been indicated when the court handed down *Connally v. Georgia, Supra.* (See Page 2 of Statement of Case).

CONCLUSION

Because petitioners have been deprived of rights to due process long established, and because the courts of review in Georgia have mistakenly treated the trial court's order suppressing the illegally seized evidence against petitioners as a retroactive application of a new constitutional rule, it is respectfully requested that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Roy E. Barnes

Thomas J. Browning

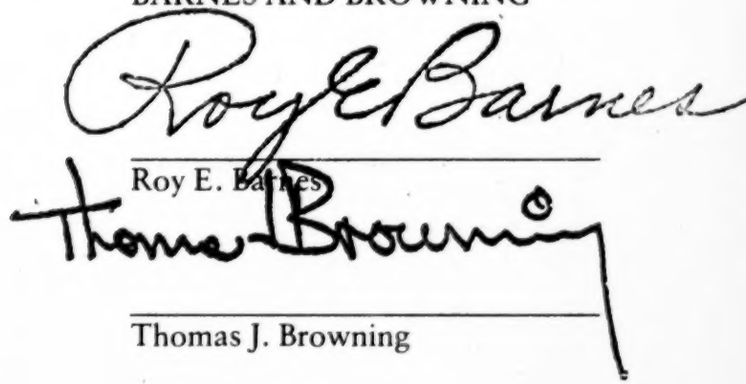
BARNES AND BROWNING
Suite 505
191 Lawrence Street
Marietta, Georgia

Attorneys for Petitioners

CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that three true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States was on this 9th day of September, 1978, mailed, postage prepaid, to the HONORABLE THOMAS CHARRON, District Attorney and HONORABLE JOE CHAMBERS, Assistant District Attorney, Post Office Box 649, Judicial Building, Marietta, Georgia 30060.

BARNES AND BROWNING



Roy E. Barnes

Thomas J. Browning

APPENDIX "A"

55545. THE STATE v. LIVINGSTON (Ben H.) et el.
W-69

Webb, Judge.

This appeal by the State from an order of the superior court suppressing certain evidence was transferred here by the Supreme Court. The evidence was seized in the exercise of a search warrant obtained by two police officers from a justice of the peace who apparently was paid on a fee basis. The warrant was issued and executed December 5, 1976. The trial court applied retroactively *Connally v. Georgia,* 429 U.S. 245 (97 SC 546, 50 LE2d 444) (1977), and suppressed the evidence.

We reverse. The ruling in *State v. Patterson*, 143 On. App. 225 (237 SE2d 707) (1977) is controlling, and we hold that the trial judge erred in applying the Connelly decision retroactively.

Judgment reversed. Quillian, P. J., and McMurray, J., concur.

IN THE SUPREME COURT
OF THE UNITED STATES

BEN HILL LIVINGSTON and
BETTY RUTH BURGESS,

Petitioners.

VS. CERTIFICATION OF RECORD

THE STATE OF GEORGIA,

Respondent.

The Clerk of the Superior Court of Cobb County is hereby on notice to certify the record in the above styled case and transmit said record to the Supreme Court of the United States for filing of the record in said Court.

BARNES AND BROWNING,
Attorneys for Petitioners

_____
Roy E. Barnes

_____
Thomas J. Browning

IN THE SUPREME COURT
OF THE UNITED STATES

BEN HILL LIVINGSTON and
BETTY RUTH BURGESS,

Petitioners.

VS. NOTICE OF APPEAL

THE STATE OF GEORGIA,

Respondent.

BEN HILL LIVINGSTON and BETTY RUTH BURGESS hereby file their Notice of Appeal appealing their denial for a Writ of Certiorari to the Supreme Court of Georgia (Denied June 9, 1978) seeking to reverse the Court of Appeals of Georgia which overturned the grant of a Motion to Suppress in the Superior Court of Cobb County. The Court of Appeals decision was rendered on April 6, 1978, and a rehearing of that decision was denied on April 28, 1978. The original granting of the Motion to Suppress was granted in the Superior Court of Cobb County on April 25, 1977.

This appeal is being filed pursuant to 28 U.S.C.A. § 1257(3).

BARNES AND BROWNING
Attorneys for Petitioners

_____
Roy E. Barnes

_____
Thomas J. Browning

IN THE SUPERIOR COURT
FOR THE COUNTY OF COBB

STATE OF GEORGIA

STATE OF GEORGIA

vs INDICTMENT NO. 77-0163

BEN HILL LIVINGSTON and
BETTY RUTH BURGESS

ORDER

The above styled case having come on regularly to be heard, and the parties having stipulated to the following facts, the court finds:

FINDING OF FACT

On December 5, 1976, Detective Paul Moore of the Cobb County Police Department secured a search warrant from Judge Cecil A. Daniel, a duly elected Justice of the Peace of the Coxes District (GM #895). The warrant was issued for the premises located at 5830 Powell Drive, Mableton, Georgia, and occupied by Ben Livingston.

As a result of this search, certain property (described in the search warrant return) was seized and forms the basis for prosecution in the above referenced indictment.

CONCLUSIONS OF LAW

The issue presented by the parties is whether or not the holding in *Connally v. Georgia*, ____U.S.. ____, 97 S. Ct. 546, is to be applied to cases which are presently pending and involve warrants issued prior to the *Connally* decision.

In *Linkletter v. Walker*, 381 U.S. 618, the United States Supreme Court considered when to apply new constitutional decisions retrospectively. The court reviewed past decisions which dealt with the application of new decisions retrospectively and concluded that a case which had been decided finally prior to the new decisions should not be given the benefit of the new decision. In arriving at their decision the court stated.

> [9] Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a merit decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Desist v. U.S., 394 U.S. 244, 248, further noted:

> [3] Ever since Linkletter v. Walker, 381 U.S. 618, 629, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 established that "the Constitution neither prohibits nor requires retrospective effect" for decisions expounding new constitutional rules affecting criminal trials, the court has viewed the retroactivity or nonretroactivity of such decisions as a function of three considerations. As we most recently summarized them in Stovall v. Denno, 388 U.S. 293, 297, 87 S. Ct. 1967, 1970, 18 L.Ed.2d 1199, "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

In applying new constitutional rules, the above three factors have been determinative in most but not all cases.

As noted in *Linkletter, supra.* 627, "under our cases it appears . . . that a change in law will be given effect while a case is on direct review . . . " Two cases exemplify this point. One is *Fahy v. Connecticut*, 375 U.S. 85, which was on appeal when *Mapp v. Ohio*, 367 U.S. 643, was decided. Since the case was not final the Supreme Court did not even question the application of *Mapp* in finding that the evidence involved should be excluded. A second case which turned on finality is *O'Connor v. Ohio*, 385 U.S. 92. The court noted that:

> it is clear the prospective application of that rule, announced in *Tehan v. U.S. ex rel. Shott*, 382 U.S. 406, 86 S. Ct. 459, 15 L.Ed 2d 453 [which had applied the three determinative factors], does not prevent petitioner from relying on *Griffin*, since his conviction was not final when the decision in *Griffin* was rendered.

Thus, it cannot be doubted that if a decision is not final a new decision affecting the case under consideration may be applied.

The question is whether to apply the three factors test or whether to go solely on finality. In deciding this question we find that cases applying the three factors test have dealt with changes in constitutional rules, such as the exclusionary rule, rather than a determination of the application of constitutional law.

While a search and seizure was involved in *Connally*, the heart of the court's decision deals with the denial of due process caused by the Justice of the Peace's pecuniary interest in the issuance of the warrant. Since the issuance

of the warrant where a pecuniary interest is present is prohibited by the due process clause of the Fourteenth Amendment, any warrant which is issued must be perceived as being void. Such was the finding in *Connally*. And, as such, the decision does not announce a new Constitutional Rule or even a change in an existing rule as is the situation in most search and seizure cases. Rather, *Connally* applies the law as it has existed since *Tumey v. Ohio*, 273 U.S. 510. Since existing law is the basis of the Connally decision, we find that the three factor test which is applied to new constitutional rules is in applicable to the case presently pending. The court must follow the precendent established by *Fahy* and *O'Connor* and allow the *Connally* decision to be applied to cases which are not final.

THEREFORE, IT IS ORDERED AND ADJUDGED that any evidence seized in the foregoing case pursuant to the warrant issued on December 5, 1976 be suppressed.

This, the 25th day of April, 1977.

Howell C. Ravan, Judge
Cobb Superior Court

SUPREME COURT OF GEORGIA

ATLANTA, JANUARY 5, 1978

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

State of Georgia v. Ben Hill Livingston et al.

From the Superior Court of Cobb County.

It is ordered that this case be hereby transferred to the Court of Appeals. See State v. Patterson, __Ga. App. __ (__SE2d__)(Case No. 54176, decided September 8, 1977).

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, January 5, 1978

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Deputy Clerk.

COURT OF APPEALS
of the State of Georgia

ATLANTA, April 28, 1978

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

55545. The State v. Ben H. Livingston et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA April 28, 1978

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta, June 9, 1978

Dear Sir:

Case No. 33837, Livingston et al. v. The State.

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Hill, J. Dissents

Very truly yours,
MRS. JOLINE B. WILLIAMS, Clerk

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

No. 78-412

BEN HILL LIVINGSTON AND BETTY RUTH BURGESS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

On Petition For Writ of Certiorari To The Court Of Appeals of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
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ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

The State of Georgia, by and through the Attorney General of the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Georgia Court of Appeals' decision in this case. That opinion is reported at 145 Ga. App. 792.

QUESTION PRESENTED

Was the Georgia Court of Appeals correct in holding that this Court's decision in Connally v. Georgia, 429 U.S. 245 (1977) should not be applied retroactively, to a search warrant executed prior to the date of that decision?

REASONS FOR DENYING THE WRIT

THE GEORGIA COURTS' HOLDING THAT CONNALLY V. GEORGIA, 429 U.S. 245 (1977) WAS NOT TO BE APPLIED RETROACTIVELY IS CONSISTENT WITH NUMEROUS DECISIONS OF THIS COURT, WHICH HAVE HELD THAT PROSPECTIVE APPLICATION OF NEW STANDARDS IN FOURTH AMENDMENT CASES IS GENERALLY APPROPRIATE.

The Georgia Court of Appeals rejected Petitioner's contention that Connally v. Georgia, 429 U.S. 245 (1977) should be applied in his case, to invalidate a search warrant issued on December 5, 1976, prior to the date of the Connally decision. Petition, Appendix A. The opinion in Petitioner's case cited the Georgia Court's previous decision in State v. Patterson, 143 Ga. App. 225, 235 S.E.2d 707 (1977).

In State v. Patterson the Court of Appeals reversed a trial court's decision that the Connally decision should be

applied retroactively. The Patterson opinion cited this Court's opinions in U.S. v. Peltier, 422 U.S. 531 (1975) and U.S. v. Calandra, 414 U.S. 338, 348 (1974). The Peltier opinion refused to apply retroactively the decision in Almeida-Sanchez v. U.S., 413 U.S. 266 (1973), in which the court had held that a warrantless automobile search conducted 25 miles from the Mexican border by agents acting without probable cause was violative of the Fourth Amendment.

Subsequent to the filing of the petition in this case, the Supreme Court of Georgia has specifically held that this Court's decision in Connally v. Georgia, supra, should not be applied retroactively. Contreras v. State, ____ Ga. ____ (Case No. 33798, decided October 17, 1978). Applying this Court's decision in U.S. v. Peltier, supra, the Georgia Supreme Court found that the law enforcement officials in question had relied in good faith on the Georgia statutory procedures in effect at the time of the search, as interpreted by the Georgia Supreme Court in Connally v. State, 237 Ga. 203, 227 S.E.2d 352 (1976). As in Petitioner's case, the search warrant had been executed prior to this Court's decision in Connally v. Georgia, supra, and the trial had taken place after that decision. Contreras v. State, supra.

Petitioner's assertion that this Court's Connally decision was merely an application of a fifty-year old principle set forth in Tumey v. Ohio, 273 U.S. 510 (1927) is unpersuasive. In Connally this Court held for the first time that a justice of the peace

who receives a fee for issuance of a criminal warrant may not be considered a "neutral and detached magistrate" within the meaning of the Fourth Amendment. Prior decisions had dealt with magistrates making final judgments or magistrates actually involved in the enterprise of ferreting out crime. See e.g., Ward v. Village of Monroeville, 409 U.S. 57 (1972); Johnson v. United States, 333 U.S. 10 (1948); Bevan v. Krieger, 289 U.S. 459 (1933); Bennett v. Cottingham, 290 F.Supp. 759 (N.D. Ala. 1968), aff'd, 393 U.S. 317 (1969).

This Court's decision in U.S. v. Peltier, 422 U.S. 531 (1975) summarized the Court's efforts in recent years to determine whether rulings in criminal cases should be given retroactive effect. Id. at 535-37. In discussing the retroactivity of cases involving the exclusionary rule, the court observed that decisions where "concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process . . ." have invariably been given only prospective application. Id. at 535. The Peltier decision summarized the underlying basis for these decisions:

> "[I]f the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner." Id. at 537.

The Court's decision in Peltier also recognized that the purposes of the exclusionary rule were best served by prospective application, inasmuch as the rule is "a judically created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." U.S. v. Calandra, 414 U.S. 338, (1974). See Michigan v. Tucker, 417 U.S. 433, 447 (1974). In its recent discussion of whether this Court's decision in Connally v. Georgia should be applied retroactively, the Georgia Supreme Court noted that the deterrent effect of the exclusionary rule is served by prospective application only, citing the Peltier decision. Contreras v. State, supra.

In holding that this Court's decision in Connally v. Georgia, 429 U.S. 245 (1977) should not be applied retroactively, the Appellate Courts of Georgia have ruled in accordance with and in reliance on applicable decisions of this Court. There is thus no basis for this Court to review the decision in this case.

CONCLUSION

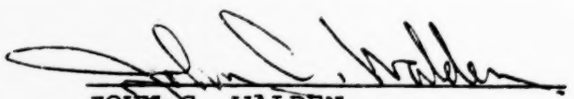
For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General



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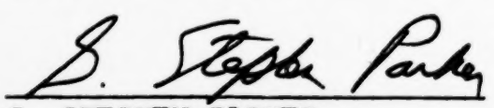
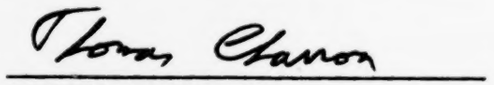


G. STEPHEN PARKER
Assistant Attorney General



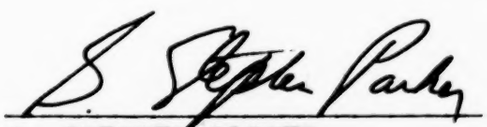
THOMAS CHARRON
District Attorney
Cobb Judicial Circuit

CERTIFICATE OF SERVICE

I, G. Stephen Parker, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon the Petitioner by depositing a copy of same in the United States mail, with proper address and adequate postage to:

Mr. Thomas J. Browning
Barnes & Browning
P. O. Box 751
191 Lawrence Street
Suite 505
Marietta, Georgia 30060

This 30 day of October, 1978.



G. STEPHEN PARKER